Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1997

JOSEPH D. JONES,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

Petition for Writ Of Certiorari
To The United States Court Of Appeal
For The District of Columbia

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

Whether the Federal Communications Commission (hereinafter referred to as "Commission") has the authority to withhold from the Certified Index To The Record On Appeal documents filed with the Commission which were related to a pending petition to deny which was timely filed with the Commission.

Whether the Commission has the authority to dismiss a petition to deny in violation of due process provision of the Fifth and Fourteenth Amendments, 47 CFR section 73.3588(c)(2), 5 U.S.C. Section 2(B) and 5 U.S.C. Section 706(1),(2)(A)(C)(D).

Whether the court below correctly interpreted 47 CFR section 73.3588(c)(2), 5 U.S.C. Section 2(B), 5 U.S.C. Section 706(1),(2)(A),(C),(D), due process requirements of the Fifth and Fourteenth Amendments of the Constitution of the United States or United States Supreme Court case law.

PARTIES TO PROCEEDING

1) Federal Communications Commission

2) KOLA, INC., and Frederick R. Cote

3) Ray M. Stanfield, Receiver

4) Inland Empire Broadcasting Corporation

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Joseph D. Jones, respectfully pray that a writ of certiorari be issued to the United States Court of Appeals District of Columbia Circuit, to review the judgments of the Court of Appeals filed September 5, 1997 and December 24, 1997, which denied motions filed in that Court by the petitioner.

ORDERS BELOW

The order of the Court of Appeals was filed on September 5, 1997, and appear herein as Appendix A. On December 24, 1997, and appearing herein as Appendix B, the Court of Appeals filed an order in response to Petitioner's Motion For Reconsideration of the September 5, 1997 order./[1]

JURISDICTION

The order of the United States Court of Appeal for the District of Columbia Circuit in this matter was filed on September 5, 1997. Petitioner filed a timely Motion For Reconsideration on September 25, 1997. On December 24, 1997, the court below filed an order relative to the Motion For Reconsideration.

1/ See Court of Appeals order - Appendix C.

This petition for writ of certiorari is timely filed within (90) days of the date of the denial of the Motion For Reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This petition present questions concerning the non application by the court below of the due process requirements of the Fifth and Fourteenth Amendments of the Constitution, 309(a) and 309(d)(1) of the Communications Act of 1934 as amended, 5 U.S.C. Section 2(B) and 5 U.S.C. Section 706(1),(2)(A)(C)(D).

STATEMENT OF THE CASE

This petition arises from the denial by the U. S. Court of Appeals District of Columbia Circuit of a motion to augment the record on appeal. Petitioner filed an appeal in the U. S. Court of Appeals seeking a reversal of a decision by the Commission which granted the transfer of license to operate a radio station (KOLA-FM, San Bernardino, California) from a convicted murderer currently serving a 25 year life sentence, one Frederick R. Cote and KOLA, Inc., to Inland Empire Broadcasting, another questionable licensee.

On September 21, 1992, an application for consent to assignment of license (hereinafter referred to as "Application") was filed with the Commission requesting approval for the transfer of license to operate KOLA-FM, San Bernardino, California from the assignor KOLA, Inc., to the assignee SBR Broadcasting Corporation (hereinafter referred to as "SBR")/[2].

Between the period October 23, 1992 to July 1, 1994, Petitioner filed with the Commission a petition to deny (hereinafter referred to as "Petition") and over 60 supporting documents and exhibits which were related to the requested denial of the Application./[3] All documents contained verified specific allegations of facts sufficient to show that retention or transfer of license by the licensee would be inconsistent with the

[2]/ The parent company of SBR is Anaheim Broadcasting Corporation (hereinafter referred to as "Anaheim"). Anaheim is also the parent company of Inland Empire Broadcasting Corporation (hereinafter referred to as "Inland Empire").

[3]/ Petitioner filed petitions to deny subsequent applications for transfer of license to operate KOLA-FM and KMET-AM out of an abundance of caution. The application for assignment of KOLA-FM (BALH 940706GP) involved applicants with the same interest as the original Application (BALH 920921HJ).

public interest./[4]

The Petition asserted, in part, that Frederick R. Cote, the 100% shareholder of the former licensee for KOLA-FM, KOLA, Inc., and the assignee SBR, were in violation of a number of Commission rules and policies. The principal allegations were as follows:

1) Mr. Cote was charged with murder and 4 other felonies in Riverside, California. Mr. Cote planned all of the acts while on the premises of KOLA-FM,/[5] 2) as the 100% shareholder of the licensee, Mr. Cote abandoned the license to operate KOLA-FM, 3) there was a premature transfer of control and a perfected security interest in the license to operate KOLA-FM, 4) both applicants were guilty of filing fraudulent applications with the Commission.

[4]/ The documents submitted to support the allegations asserted in the Petition of October 23, 1992, differ in some respects from subsequent petitions to deny and, in some cases the evidence filed in 1992 was more graphic.

[5]/ Mr. Cote was convicted on July 11, 1994. He received a 25 years to life sentence without the possibility of parole on November 30, 1994. On March 9, 1993, Petitioner filed with the Commission a document from the District Attorney's office of Riverside County California. That document indicated that in 1978, during the time that he was a Commission licensee, Mr. Cote was charged with some of the same crimes for which he received the July 11, 1994 conviction.

Notwithstanding Commission rules and case law precedent, at no time did the Commission respond to, address, or for that matter, even acknowledge that there were any documents filed by Petitioner during the period between October 23, 1992 to July 1, 1994. The only passing references to the Petition itself was contained in a July 27, 1994, Commission staff's letter (hereinafter referred to as "Letter Order") (Court of Appeals case number, 96-1206, Motion to Remand, Exhibit 1/[6])/[7] and the subsequent Memorandum Order and Order, FCC 96-372 (hereinafter referred to as "MO&O"), which was released by the Commission on October 25, 1996 (see Notice of Petition For Review, Ex. 1, filed on November 25, 1996)./[8]

Pursuant to 47 C.F.R. Section 73.3584 and in accordance with *Section 309(d)(1) of the Communications Act of 1934, as amended*, Petitioner filed the Petition

[6]/ Unless stated otherwise, all exhibits referred to can be located in the Motion to Remand which was filed with the court below on July 7, 1997, Court of Appeals case number 96-1206.

[7]/ The inappropriate non-final Letter Order of July 27, 1994, which attempted to connect BALH 920921HJ to subsequently filed applications violated the intent and purpose of this Court's ruling in *Astroline Communications Co. v. F.C.C., 857 F.2d 115 (D.C.Cir. 1988).* See 47 C.F.R. Section 73.3588(c)(2).

[8]/ MO&O, p. 2 at 2, p. 5 at n. 8, 9.

which contained specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity. Section 309(a) required the Commission to conduct an evidentiary hearing to aid the Commission in furthering its mandate to promote the public interest./[9]

The Commission abridged its mandated responsibility with respect to Sections 309(a) and 309(d)(1) of the Communications Act as to the Application and the Petition. See also *Astroline Communications Co. v. F.C.C., supra.*

Moreover, the Commission released rulings that were in conflict with the Commission's own rules. Two such rules involving conflicts were 47 C.F.R. Section 73.3518 and 47 C.F.R. Section 73.3588(c)(2).

47 C. F. R. Section 73.3518.

The rule is abundantly clear: "While an application is pending and undecided no subsequent inconsistent or conflicting application[s] may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee." 47

9/ The seriousness of Mr. Cote's crimes and the impact on the public interest will not be discussed in depth here. However, the California state court recognized the particularly heinous nature of the crimes of Mr. Cote when it pronounced sentence. See also Motions To Stay, filed February 18, 1997 and April 18, 1997.

C.F.R. Section 73.3518/[10]

On May 13, 1994, the receiver Ray M. Stanfield (hereinafter referred to as "Receiver")/[11] filed with the Commission an application for assignment of license on FCC form 316/[12] (BALH 940513EA) (see Ex. 3)./[13] The Commission incor-

[10]/ SBR and Inland Empire, for all intents and purposes, are controlled by the same interest - Mr. Timothy R. Sullivan. The original application for assignment which was filed on behalf of KOLA, Inc., assignor, and SBR, assignee, indicate that Anaheim controlled 100% of the shares of the assignee (Exhibit 2) (On May 13, 1994, the Receiver filed an application for involuntary assignment of license on FCC form 316, Exhibit 3). The subsequent application for assignment which was filed on behalf of the Receiver and Inland Empire indicated that Anaheim controlled 100% of the shares of Inland Empire (Exhibit 4). Mr. Sullivan is the President of Anaheim, SBR and Inland Empire.

[11]/ The Ex parte Appointment of the receiver (which formed a part of FCC form 316 as Ex. C) was ordered by the Superior Court County of San Francisco at the request of Anaheim and KOLA, Inc., on April 21, 1994.

[12]/ Mr. Cote's trial started on May 18, 1994. The Commission issued the grant of license to the Receiver on June 21, 1994. Mr. Cote was convicted on July 11, 1994.

[13]/ Mr. Cote also altered his position from one apparently intent on defrauding creditors to one willing to have a receiver appointed in order to circumvent the Petition. The reason alleged by KOLA, Inc. for its support of the Ex parte Appointment of Receiver was that Mrs. Cote was misappropriating funds from one of the buildings owned by Mr. Cote (see Ex. 9). KOLA, Inc. and Mr. Cote joined Anaheim in the effort to prevent Petitioner from intervening in the state of California court case in which

rectly granted the request on June 21, 1994. Petitioner filed with the Commission a petition for reconsideration./[14]

On or about July 6, 1994, staff improperly accepted an application for assignment of license for the Receiver to transfer the license to operate KOLA-FM to Inland Empire (BALH 940706GP) prior to resolving the allegations which were previously asserted by Petitioner in the Petition against the former Application (BALH 920921HJ)./[15] Inland Empire, a shell corporation, was an entity created by Mr. Sullivan as another subsidiary (in addition to SBR) of Anaheim.

Notwithstanding the list of KOLA, Inc., creditors (Exhibit 5)/[16] which was

Anaheim obtained the ex parte appointment of a receiver.

[14]/ The Commission's ruling, p. 6 at 10 of the MO&0 was incorrect with respect to the Petition For Reconsideration. The earliest possible time to file a petition in cases involving an involuntary transfer of control is after the grant of license by the Commission. Commission Rules 47 C.F.R. Sections 73.3584(a), 73.3[illegible]o), 73.3541 and 70.3580(a)(2). There is no local public notice requirement.

[15]/ Commission rule 47 C.F.R. Section 73.3588(c)(2) required the Commission to address the Petition. See also *Astroline Communications Co. v. F.C.C., supra.* In addition, it is normal Commission policy to withhold "Further action on [an] application .... pending resolution [of a] proceeding." *Contemporary Media, Inc. FCC-410 (FCC MM Docket No. 95-154).*

[16]/ Mr. Cote testified in state of California Court that his assets were in

filed with the Commission on September 20, 1994, by the Receiver, the Receiver represented the exclusive interest of the former assignor/assignee, KOLA, Inc./ SBR./[17] Petitioner also filed a petition to deny the application for assignment./ [18]

1992 Petition/47 C.F.R Section 73.3588(c)(2).

After disregarding the pending Petition (BALH 920921HJ), the staff of the Mass Media Bureau of the Commission issued the Letter Ruling of July 27, 1994, which incorrectly accepted 2 additional applications for assignment (see Ex. 1).

> "Whenever a petition to deny ....has been filed against any application....[a] petition shall be deemed to be pending before the Commission from the time a petition is filed with the Commission

excess of $20,000,000 (Exhibit 6). The other assets owned by KOLA, Inc. and Mr. Cote were more than sufficient enough to satisfy the paltry debt of KOLA, Inc. and Mr. Cote.

[17]/ The entire exercise by the applicants was designed to circumvent the valid Petition of October 23, 1992. Petitioner advised the Commission in the newly filed petitions to deny and subsequent filings of the Commission's lapse with respect to the previously filed Petition.

[18]/ On July 23, 1994, in the Petition To Deny at p. 3, Petitioner informed the Commission of the conflicting applications.

> until an order of the Commission granting or denying the petition is no longer subject to reconsideration by the Commission or to review by any court." 47 C.F.R. Section 73.3588(c)(2).

On June 7, 1995, some 11 months following the filing of the new application for assignment (BALH 940706GP), Inland Empire attempted to revise that application. Nevertheless, the ownership interest remained the same./[19]

Those documents included a late filed security agreement, a stock pledge agreement and collateral assignment of leases./[20] Also filed with the documents was a late filed inappropriate report of the ownership structure of the assignee for KOLA-FM, Inland Empire (Exhibit 7)./[21]

[19]/ See Ex. 7.

[20]/ The Commission refused to accept for filing or consideration any documents from Petitioner that were considered by the Commission to be late filed. Some documents were filed within 48 hours of the due date. See MO&O, p. 2 at n. 2, 3.

[21]/ The documents were mysteriously filed some 11 months after the application for assignment was filed, however, the documents were filed just 22 days prior to the June 29, 1995 grant of license by the Commission. Moreover, the requested change in the ownership structure, if correct, represented a major change in the application as defined by Commission rule, 47 C.F.R. Section 73.3573(b), which required a new file number. The Commission did not assign a new file number.

Even if allowed by the rules, which it was not, the innocuous late attempt (to use a family trust in order for the principal, Mr. Sullivan, to claim that another entity purportedly represented a new and different interest) was precluded without filing a required new application for assignment. In addition, if accepted by the Commission a new file number was required. 47 C.F.R. 73.3573(b). The Commission permitted Inland Empire to file documents 11 months late, which, on the surface, placed stock formerly controlled by Anaheim in the control of a trust./[22]

On or about December 12, 1994, the Receiver filed an application for assignment of license to operate KMET-AM from the Receiver for KOLA, Inc., to JR Broadcasting Partners (BALH 941212EA)./[23] The Commission did

[22]/ Conversely, on July 27, 1994, the Commission incorrectly accepted for filing the new application for assignment at the request of Inland Empire which was filed as a result of a mere name change of the assignee. The only possible reason for the request to dismiss one application with a subsequent request on July 6, 1994, for the Commission to accept a new application for assignment, which represented the same interest, was in order to circumvent the Petition.

[23]/ The Commission failed to include documents contained in BALH941212EA as part of the "Certified List of Items in the Record" which was filed with the Court by the Commission on or about June 6, 1997. In the "Notice of Petition For Review" and the "Statement Of Issues To Be Raised On Appeal," para. 2, Petitioner specifically requested the records of BALH 941212EA to be included.

not withhold acceptance or action on this application as required. 47 C.F.R. Section 73.3588 (c)(2). On January 30, 1995, out of an abundance of caution Petitioner filed a petition to deny that application. Subsequently, the Receiver filed a request with the Commission to dismiss the application for assignment which the Commission granted.

On or about July 5, 1995, the Receiver filed another application for assignment of license to operate KMET-AM to Robeson-Suttles Broadcasting, Inc. (BAL 950705EA). The Commission failed to consider the pending Petition and the allegations contained therein once again.

The Commission acted on the newly filed petitions to deny only after the collective applicants, after a series of misfires (including the dismissal of 2 defective applications for assignment), were able to file new applications.

The newly submitted applications to the contrary, the Petition of October 23, 1992, was never granted or denied by the Commission as required by 47 C.F.R. Section 73.3588(c)(2) of the Commission rules.

Moreover, Section 309(d) of the Communications Act required the Commission to follow a step by step procedure with respect to BALH 920921HJ in order to determine if a hearing was called for. See also *Astroline Communications Co. v. F.C.C., supra*. If after a hearing the Commission found that <u>it was not in</u>

the public interest to permit the licensee to retain the grant of license, there would not have been a license to assign.

> "It is the recognized policy of the Commission that assignment of broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization." *Jefferson Radio Company v. F.C.C., 340 F.2d 781 (1964).*

Second Thursday Policy.

As a limited exception to the *Jefferson Radio Policy* under the *Second Thursday Policy*/[24] the Commission will, in the public interest, "forgive" the transgressions of a wrongdoer (in bankruptcy or receivership) and permit the transfer of license of a broadcast facility provided the wrongdoer receives little or no benefit from the sale of the license. Or, the wrongdoer will receiver only minor benefit which is outweighed by equities in favor of innocent creditors./[25]

[24]/ *Second Thursday Corp., 22 FCC 2d 515 recon. granted, 25 FCC 2d 112 (1970).* See also *Shell Broadcasting Inc., 30 F.C.C. 2d 929 (1973).*

[25]/ Petitioner filed documents with the Commission which refuted the claim that the position of the former licensee was that of a bankrupt. The Commission refused to consider those documents. Also, the Commission's

Application of *Second Thursday* was procedurally not correct in the instant case. *Jefferson Radio Policy, supra.* The Commission must address the Petition and the allegations previously asserted in BALH 920921HJ. *Astroline Communications v. F.C.C., supra.* Moreover, even if application of *Second Thursday* was procedurally correct, which it was not, application of that policy was grossly inappropriate in the instant case for 4 extremely valid reasons.

First. The Commission did not address the prior Petition (BALH 920921HJ). Second. The Ex parte Appointment of the Receiver was a sham./[26] As the major debt holder with approximately 70% of the total debt, Anaheim, and its subsidiary, as the only party(s) (other than Mr. Cote) that requested the appointment of a receiver could dictate under what terms a receiver would be appointed. It was a clear conflict of interest for the assignee to also be a major debt holder of the assignor. Third. Mr. Cote, the 100% shareholder of the licensee KOLA, Inc., claimed assets that exceeded by a substantial margin the $1.1 million debt as alleged by counsel for KOLA,

Second Thursday Policy present very serious Constitutional issues which will be addressed in due course.

[26]/ Petitioner is in litigation in state of California court on this matter. All that is required in California in order to obtain a court ordered ex parte appointment of a receiver, if a debt is not repaid, are 2 consenting adults and a mutually agreed upon receiver.

Inc. (Exhibit 8, item 19; see also Ex. 5). KOLA, Inc., was in a position to repay the entire debt with non broadcast assets. Fourth. The indirect benefit received by Mr. Cote was substantial - $400,000.00.

Application of the *Second Thursday Policy* was wholly inapplicable.

> "...[T]he Commission should assure itself that licensees do not use bankruptcy [or other receivership actions] as a means of circumventing their obligation to operate in the public interest." LaRosa v. F.C.C., 494, F2d 1145, n.2.

The statement of the Commission was absolutely incorrect in the MO&O, p. 11 at 19. "We conclude that Cote's receipt of the loan from KOLAI 1992 out of funds lent to KOLAI by Anaheim was not a benefit to him from the assignment of the station to Inland." Sic./[27]

KOLA, Inc. was the alter ego of Mr. Cote. The Superior Court County of Riverside California in its order ruled that triable issue of fact exists as to intent of Mr. Cote to defraud creditors of KOLA, Inc., "...as well as whether the debts incurred were intended not to be paid." (Exhibit 9)./[28] The ruling by

[27]/ See also MO&O, p. 3 at 2.

[28]/ The same information was filed with the Commission on June 13, 1996 (see case no. 95-1572, Reply to Emergency Motion To Stay, Ex. 2, filed June 13, 1996). This Court dismissed the appeal on August 26, 1996 because Petitioner failed to exhaust administrative remedies.

the state court of California, which was based on the finding that KOLA, Inc., was the alter ego of Mr. Cote, provides incontrovertible proof that the debtor, KOLA, Inc. and the debtor, Mr. Frederick R. Cote, for all intense and purposes, were the same entities. Any indirect benefits received by one, would also be received by the other./[29] In addition, the $400,000.00,/[30] allegedly loaned to Mr. Cote by KOLA, Inc., out of the proceeds of the $500,000.00 loan received by KOLA, Inc., from Anaheim, is not collectable. MO&O, p. 11 at 19./[31]

> "The financial benefits which would accrue to innocent creditors, though not unimportant,are outweighed by the substantial direct and indirect benefits which [the wrongdoer] would receive..." *Mid-State Broadcasting Company, 61 F.C.C. 2d 198.*

[29]/ The debt of KOLA, Inc. to be extinguished after application of the *Second Thursday Policy* was listed at $1,133,421.37 (see Ex. 5).

[30]/ The $400,000.00 debt, which formed an essential component of the total loan package that amounted to $500,000.00 (and the asset purchase agreement between the assignor and assignee), made the application of the *Second Thursday Policy* possible. There would be no *Second Thursday* application to consider without the arrangement between KOLA, Inc. and Anaheim.

[31]/ Mr. Cote is currently serving a life term with no parole in California State Prison. He has asserted that he no longer has any assets. Mr. Cote is faced with the awesome task of collecting a $400,000.00 debt from himself.

> "The Commission previously held that the public interest would not be served by allowing the principals to receive a direct [or] indirect benefit in cases which involve request for application of the *Second Thursday Policy." Capital City Communications Inc., 33 F.C.C. 2d. 703.*/[32]

The Commission state in the MO&O that "...staff properly conditioned the present assignment of the post-closing submission by the Receiver of a statement verifying that in the final disposition of KOLAI's assets, Cote did not in fact receive any benefit." MO&O, p. 10 at 17. The latter statement is entirely speculative. There is no way to be sure the Receiver will still be assigned receivership responsibility when the final proceeds are collected, $1,650,000.00, on July 15, 2001.

Reasoned Explanation.

Commission staff prematurely decided the fate of the valid pending Petition and departed from established Commission policy when staff accepted the new applications for filing on July 27,

[32]/ The $500,000.00 note was personally guaranteed by Mr. Cote. Almost $800,000.00 of the $1.1 million debt was owned to Anaheim or SBR. Over $600,000.00 was incurred as a result of the KOLA, Inc. note held by Anaheim.

1994./[33]

The decision to accept and act on the new applications in lieu of expediting the Petition was a clear violation of the Commission's own rules, policies and prior case law. C.F.R. Section 3518, C.F.R. Section 3588(c)(2); *Jefferson Radio Policy, supra; Second Thursday Policy,* supra; *Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F2d 392; Gencom, Inc. v. F.C.C., 832 F2d 171 (D.C. Cir. 1987); Astroline Communications Co., supra.*/[34]

The Commission must provide a reasoned explanation when, as here, there is any deviation from, or, a "substantive departure" from stated Commission policy. *Coalition for Pres. of Hispanic Broadcasting v. F.C.C., 893 F.2d 1349 (D.C.Cir. 1990).* The Commission must "...articulate with reasonable clarity its reasons for decision..." *Greater Boston Television Corp. v. F.C.C., 444 F.2d at 851.*

[33]/ "...[T]he agency cannot silently depart from previous policy or ignore precedent." *Committee for Community Access v. F.C.C., 737 F2d 74 (1984).*

[34]/ The acceptance and grant by the Commission of the subsequent application for assignment FCC form 316 before addressing the Petition To Deny was clearly contrary to the direction of this court in *Astroline Communication Company, supra* and 47 C.F.R. Section 73.3588 of the Commission's rules.

Not once did the Commission provide a reasoned explanation for its abject failure to adhere to its own rules, policies and prior case law. The Commission decisions with respect to the Petition were not just arbitrary and capricious. On the contrary. The attitude displayed by Commission's in-action with regard to the Petition, in addition to being arbitrary and capricious, was also one of benign neglect. It is appropriate in all such cases for the Court to find in favor of a party that is adversely effected by the Commission's arbitrary and capricious decisions. *Astroline Communications Co., supra. Citizens for Jazz on WRVR, Inc., v. F.C.C., supra; Gencom, Inc. v F.C.C., supra).*

In addition, as another example of the arbitrary and capacious nature of the Commission's decisions with respect to Petitioner, the Commission cited 47 C.F.R. section 1.115(c) in the MO&O/[35] as justification for not considering an argument previously asserted by Petitioner in the Petition. The ruling in the MO&O by the Commission with respect to the abandonment of license by Mr. Cote is also in conflict with the "without prejudice" statement contained in Commission staff's Letter Order of July

[35]/P. 5, n. 8, 9.

27, 1994.

The Commission staff decision, as reflected in the non final Letter Order dismissing the Application before taking action on, or, responding to the Petition of October 23, 1992 (and supporting documents), not only violated Commission rules, policies and prior case law, that Letter Order also contravened Petitioner's right to Due Process under the Fifth and Fourteenth Amendments of the U. S. Constitution.

Moreover, with respect to the Application and the Petition, the Commission's mandate was clear. That mandate required the Commission to apply the rules evenly (not arbitrarily or capriciously) and to formulate rules, policies and decisions that are consistent with the public interest, convenience, and necessity. *Section 309 of the Communications Act*. In this case, the Commission overlooked that mandate. Moreover, the Commission – in the public interest – overlooked the crimes of a convicted murderer, failed to follow its own rules, policies and case precedent, and, would not accept verifiable qualified evidence that revealed that the assignee filed fraudulent employment reports./[16] MO&O, p. 8 at 14.

36/ The president of the assignee fraudulently claimed in 3 annual employment reports previously filed with the Commission that one of his employees was Hispanic. Birth records indicated those reports were frauds

REASON FOR GRANTING WRIT

The Court below has thus far, without citing statutes or case law, declined to issue rulings that would reverse violations by the Commission of: (a) rights which are granted under the Constitution, (b) statutes or, (c) case law, all of which are cited above.

Petitioner respectfully request this Court to grant this petition with respect to the orders of the court below not only because those order would allow the Commission to disregard a valid petition to deny by arbitrarily dismissing the Petition, but also because the decision of the court below would permit the Commission to avoid adhering to due process requirements, its own rules, policies and the prior direction of this Court with respect to petitions to deny. And, also, because the Commission absolutely refused to provide a reasoned explanations for the contravention of the Commission's own *Aricibo Radio Policy, 101 FCC 2d, 545 (1985)/.*[37]

(Exhibit 10). They verified prior allegations asserted on August 13, 1994, which were based on Petitioner's personal first hand knowledge, that the employee, a Ms. Dawn M. Ortiz, was not an Hispanic, as fraudulently claimed by the assignee. Records obtained from the California Secretary of State's office confirmed that a Ms. Dawn Marie Ortiz was still employed by KCAL-FM, which is licensed to SBR (Exhibit 11). Ex. 10 and 11 were filed with the Commission on December 4, 1995.

[37]/ The Commission was notified August 8, 1996 of pending legal action between Petitioner and the Respondents before the Commission released

Abandonment of License/Unauthorized Transfer of Control.

Not only did the Commission fail to address the Petition, the Commission also failed to address allegations regarding documents filed with the Commission on September 26, 1991 and November 24, 1992. On September 26, 1991, the former Mrs. Cote filed an application for new broadcast station license in connection with KOLA-FM (Exhibit 12)./[38] Her counsel informed the Commission of the transfer of KOLA, Inc., stock to Mrs. Cote. On the latter date Petitioner filed with the Commission a document which contained the testimony of the former Mrs. Cote which provided further confirmation that Mr. Cote abandoned the license to operate KOLA-FM (Exhibit 13). Each document provided substantial verification that there was an unauthorized transfer of control of KOLA-FM to the former Mrs. Cote and an abandonment of license./[39]

The documents represents a categorical admission by Mr. Cote's former wife and his former counsel that the 100%

its MO&O of October 25, 1996 (see case No. 95-1572, Addendum to Emergency Motion To Stay, Ex. 1, filed August 8, 1996).

[38]/ An excerpt of page 4 of the exhibit reads as follows: "Thus Jane E. Cote as conservator holds all the stock of KOLA, Inc."

[39]/ This evidence was filed with the Commission on March 9, 1993.

shareholder of the former licensee had abandoned the license to operate KOLA-FM. Also, the acceptance by the Commission of the request to grant control of the license to the former Mrs. Cote (see Ex. 12) represent tacit acknowledgment that Mr. Cote did abandon the license and there was an unauthorized transfer of control.

On April 7, 1993, Petitioner filed with the Commission documents from the District Attorney (Exhibit 14, p. 3:23) and the police department for the county and city of Riverside, California (Exhibit 15), respectively. Those reports provided additional verification that the licensee had abandoned KOLA-FM by seeking asylum in South America. Those allegations and evidence filed with the Commission in the Petition were never addressed. Commission rule 47 C.F.R. Section 73.3588(c)(2) required the Commission to address the Petition and allegations contained therein before the Commission could take any action on the new applications. See *Astroline Communications Co. v. F.C.C., supra.*

Moreover, Commission staff's confusing Letter Order to the contrary, the Commission must address the Petition./[40]

[40]/ The non final Letter Order attempted to dismiss the Application and thereby the Petition (with prejudice as to the allegations contained in the Petition - see note 8 and 9 of the MO&O). Nevertheless, the Commission

The last 2 sentences of note 8 of the MO&O sum up the Commission's position with respect to Petitioner's Petition (and all subsequent petitions to deny filed by Appellant)./[41]

With all due respect to the Commission, the allegations asserted in the Petition (which included allegations of murder, abandonment and fraud) involve extremely serious public interest considerations that required Commission attention long before dismissal of the Application./[42]

CONCLUSION.

The order of this Court of Appeal was that "The additional documents are not a part of the record of the proceeding under review." Appendix B, Order, para. 2. The order therefore affirmed findings outlined in the Commission's

observed: "This action is without prejudice to any action the Commission deems appropriate with respect to the matters presented in the petition to deny."

41/ The Commission assert "Nor do Jones's allegations raise an issue of substantial public interest importance warranting our consideration of the issue notwithstanding these procedural infirmities. Thus we will not consider the argument further."

42/ At note 8 and 9 of the MO&O the Commission referred to the "untimelyness" of allegations raised by Petitioner. A petitioner before the Commission is not required to make an allegation 2, 3 or 4 times before the Commission should act, no more than an individual should be required to report a murder to the local police department more than once

MO&O and the position taken by the Commission in the "Supplemental Response of FCC To Motion To Compel Production Of Additional Documents" (hereinafter referred to as "Response") filed with the court below on or about June 23, 1997. Court of Appeals, Case No. 96-1206.

The Commission has taken the position that it need not address issues raised in Petitioner's Petition to Deny (BALH 920921HJ) which was filed on October 23, 1992 because those issue were allegedly not raised in Petitioner's subsequent Petition to Deny which was filed on July 23, 1994.

The Commission also assert "...that the assignment application to SBR is not before the Court and the record in this case should not include documents from the file in the earlier proceeding." Response, p. 3, para. 1. In addition, the Commission state "By its terms, the order on appeal considered the following two application only: (1) the May 13, 1994 application of KOLA, Inc., assignor, and Stanfield, receiver/assignee (FCC File No. BALH-940513EC) for pro forma assignment of the license of station KOLA(FM); and (2) the subsequent July 6, 1994 application of Stanfield, receiver /assignor, and Inland Empire, assignee (FCC file NO. Bal-940706GP)..." Response, p. 3, para. 2.

The Commission has taken the position that the issues raised by Petitioner in the former petition (BALH

920921HJ) were never raised in the Petitioner's subsequent petition (BAL-940706GP) even though BALH 920921HJ was incorporated by reference into subsequent documents, BALH 940513EA and BAL 940706GP.

Petitioner's Petition For Reconsideration, filed on July 23, 1994 (BALH 940513EA) and Petition To Deny of July 23, 1994 (BAL-940706GP) included by reference the former petition (BALH 920921HJ) and allegation contained therein no less than 20 times.

"The application for transfer, BALH 940706GP, currently before the Commission represent[] the latest attempt by the former assignor, KOLA, Inc.. and assignee, SBR Broadcasting, Inc. [] to transfer the license of KOLA-FM ([see] BALH 920921HJ)." Petition TO Deny, BAL-940706GP, filed July 23, 1994, p. 1, para. 1.

"The 'beneficial licensee' was also the former assignor on the last application for transfer FCC 314, BALH 920921HJ..." Id., p. 2, para. 1.

"Therefore, the issues brought to light in the last petition to deny [BALH 920921HJ] filed on October 23, 1992, are issues that continue to be very significant as they involve the same principals, the 'beneficial licensee' and the assignee. These issues have very substantial public interest concerns that should and must be addressed by the Commission." Id., p. 2, para. 3.

Moreover, the finding of the Commission in the MO&O that "Nor do Jones's allegations raise an issue of substantial public interest importance warranting our consideration of the [abandonment] issue..." (MO&O, n. 8) "... without a review of the evidence is beyond the power of the Commission." United States v. Abilene & S. Ry. Co. 44 Sup.Ct. 456, 265 U.S. 274.

"A finding without evidence is arbitrary and baseless" Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 91, 93, 33 Sup. Ct. 185, 57 L.Ed.

"... [A] finding without evidence is beyond the power of the Commission." New England Divisions Case, 261 U.S. 184, 198, note 19, 43 Sup. Ct. 270, 67 L.Ed.605.

Petitioner filed with the Commission pleadings and documents in a timely manner. Those documents referred to the allegation of abandonment which the Commission has steadfastly refused to address.

"It is well established that [] the pleadings and the evidence constitute the record upon which the decision must be based." Norris & Hirshberg v. Securities and Exchange Commission 163 F.2d 689.

The allegations contained in the original petition to deny (BALH 920921HJ), filed on October 23, 1992, and subsequently referred to in Petitioner's Pe-

tition for Reconsideration, filed on July 23, 1994 (BALH 940513EA) and the Petition to Deny of July 23, 1994 (BAL 940706GP) should be included as part of the record. "[T]here is jurisdiction [for the court] to take evidence upon the merits of the original controversy." Interstate Commerce Commission v. Louisville & Nashville R. Co., supra.

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals misconstrued the statutes, overlooked case law and Due Process requirements of the Fifth and Fourteenth Amendments of the Constitution. By not compelling the Commission to include documents from the Petition of October 23, 1992, as part of the Certified Index To The Record, the decision of the court below will not only impact the rights of this Petitioner, but also, any other petitioners that come before the Commission. Whenever the Commission wish to avoid producing documents previously filed as part of a petition to deny an application the Commission could simply dismiss the application and the pending petition to deny.

Therefore, Petitioner respectfully request this Court's writ of certiorari issue requiring a review of the orders of the Court of Appeals District of Columbia Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph D. Jones, Appellant	)	September Term, 1997
v.	)	**No. 96-1436**
Federal Communications Commission, Appellee	)	Filed: Dec. 24, 1997

Inland Empire Broadcasting Corporation, etal., Intervenors
Consolidated with 96-1437

97-1207
Joseph D. Jones, Petitioner

v.

F.C.C and United States of America, Respondents

Ray M. Stanfield, et al, Intervenors

Before: Ginsburg, Rogers and Garland, Circuit Judges

ORDER

Upon consideration of the motion for reconsideration of the order denying motion to compel production of additional documents, the motion for leave to delay the filing of appellant's brief, the opposition thereto and motion to dismiss, and the reply to the opposition and opposition to the motion to dismiss, it is

ORDERED that the motion for reconsideration be denied. It is

FURTHER ORDERED that the motion for leave to delay the filing of appellant's brief be granted, and that the motion to dismiss be denied. However, we caution appellant that any future motion to extend the time for filing his brief will be granted "only

for extraordinarily compelling reasons," D.C. Cir. Rule 28(f)(1), and that the pendency of a motion for reconsideration (or any other motion) will not be considered an extraordinarily compelling reason.

The Clerk is directed to enter a new briefing schedule.

Per Curiam

B-1

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph D. Jones, Appellant	)	September Term, 1997
v.	)	**No. 96-1436**
Federal Communications Commission, Appellee	)	Filed: Sep. 5, 1997

Inland Empire Broadcasting Corporation, etal., Intervenors

Consolidated with 96-1437

97-1207

Joseph D. Jones, Petitioner

v.

F.C.C and United States of America, Respondents

Ray M. Stanfield, et al, Intervenors

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to compel production of additional documents, the supplemental response thereto, and the reply; the motion for leave to file a joint deffered appendix containing the additional documents; and the motion to remand, the opposition thereto, and the reply, it is

ORDERED that the motion to compel production of additional documents and the motion for leave to file a joint deferred appendix containing the additional documents be denied. The additional documents are not a part of the record of the proceeding under review, nor do the Jefferson Radio policy, Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988), or 47 C.F.R. Section 73.3588(s)(2) require that they be included in the record. It is

FURTHER ORDERED that the motion to remand be denied. The merits of the

parties' positions are not so clear as to warrant summary action. See Cascade Broadcasting Group, Ltd. v. FCC, 822 F2d 1172, 1174 (D.C.Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to enter a new briefing schedule.

Per Curiam

C-1

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph D. Jones, Appellant	)	September Term, 1997
v.	)	**No. 96-1436**
Federal Communications Commission, Appellee	)	Filed: May 22, 1997

Inland Empire Broadcasting Corporation, etal.,
Intervenors
Consolidated with 96-1437

97-1207
Joseph D. Jones,
Petitioner

v.

F.C.C and United States of America,
Respondents

Ray M. Stanfield, et al,
Intervenors

BEFORE: Wald, Williams, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for leave to file a deferred joint appendix; the motion for leave to file appellant's brief out of time, the motion to compel production of additional documents, the FCC's opposition to the motion for leave to file appellant's brief out of time and to the motion to compel production of additional documents and the FCC's motion to dismiss, and the response to the motion to dismiss and reply to the opposition; Inland Empire Broadcasting Corporation's motion to dismiss and the opposition thereto; the motion to consolidate, the FCC's opposition thereto, the reply to the FCC's opposition, Inland Empire's motion for leave to file an opposition, the lodged opposition, and the opposition to the motion for leave to file and reply to the lodged opposition; the motion for leave to file a reply

to the opposition to motion to stay-2[sic] out of time, the lodged reply, and the motion for reconsideration of the order denying the motion for stay; and the motion to stay filed in No. 97-1207, it is

ORDERED that the motions to dismiss be denied. It is

FURTHER ORDERED that the motion to compel production of additional documents be denied to the extent that Jones seeks to have copies of the documents provided to him by the FCC. It is

FURTHER ORDERED that the FCC file a supplemental response addressing Jones's contention in the motion to compel production of additional documents that the record should include documents from Commission Docket BAL[H] 920921HJ. The FCC's response shall be filed within 30 days of the date of this order and shall not exceed 10 pages. Jones's reply, if any, shall be filed within 14 days thereafter and shall not exceed 5 pages. It is

FURTHER ORDERED that resolution of the motion for leave to file a deferred joint appendix be deferred

pending receipt of the supplemental response. It is

FURTHER ORDERED that the motion for leave to file an opposition to the motion to consolidate be granted. The Clerk is directed to file the lodged opposition. It is

FURTHER ORDERED that the motion to consolidate be granted. It is

FURTHER ORDERED that the motion for leave to file a reply to the opposition to motion to stay-2 be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the motion for reconsideration be denied. It is

FURTHER ORDERED that the motion to stay filed in No. 97-1207 be denied. Jones has not satisfied the stringent standards for a stay pending review. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 60-61 (1977).

Per Curiam